Bruno Phillipe Fehrenbach v Pegawai Penerima, Malaysia (selaku pelikuidasi Han Pacific Sdn Bhd)

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–1926 OF 1998
ABDUL MALIK ISHAK J
4 MARCH 1999

Companies and Corporations *— Derivative action — Winding-up order was made against company after commencement of derivative action — Whether leave required for minority shareholder to proceed with action*

The applicant was a minority shareholder in a company known as Han Pacific Sdn Bhd. On 15 July 1998, the applicant filed a writ of summons in the form of a derivative action suing as a minority shareholder. On 16 July 1998, a winding-up order was made against Han Pacific Sdn Bhd and thus put the applicant in a dilemma whether he was required to apply leave to proceed with his derivative action pursuant to s 226(3) of the Companies Act 1965. Hence he made an application for a declaration that he was not required to apply leave to proceed.

Held, granting the declaration with no order as to costs:

The words 'against the company' in s 226(3) of the Companies Act 1965 were precise, clear and unambiguous and it must be the intention of the legislature to employ such words and exclude the leave requirement in a case where the action was for the benefit of the company. In this case, the said derivative action commenced by the applicant was for the benefit of the company (see pp 327F–G and 333E).

[Bahasa Malaysia summary

Pemohon adalah seorang pemegang saham minoriti di dalam syarikat yang dikenali sebagai Han Pacific Sdn Bhd. Pada 15 Julai 1998, pemohon telah memfailkan satu writ saman dalam bentuk tindakan terbitan menyaman sebagai pemegang saham minoriti. Pada 16 Julai 1998, satu perintah penggulungan telah dikeluarkan terhadap Han Pacific Sdn Bhd dan seterusnya meletakkan pemohon di dalam dilema sama ada beliau patut mendapatkan kebenaran untuk meneruskan tindakan terbitannya mengikut s 226(3) Akta Syarikat 1965. Oleh itu beliau membuat permohonan untuk satu deklarasi bahawa beliau tidak perlu meminta kebenaran untuk meneruskan tindakannya.

Diputuskan, memberi deklarasi yang dipohon tanpa perintah untuk kos:

Perkataan-perkataan 'terhadap syarikat' di dalam s 226(3) Akta Syarikat 1965 adalah tepat, jelas dan tidak kabur dan semestinya menjadi tujuan badan perundangan untuk menggunakan perkataan

tersebut serta tidak memasukkan keperluan kebenaran dalam keadaan di mana tindakan tersebut adalah untuk manfaat syarikat. Di dalam kes ini, tindakan terbitan yang dimulakan oleh pemohon adalah untuk manfaat syarikat (lihat ms 327F–G dan 333E).]

Notes

For cases on derivative action, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 58–66.

Cases referred to

AJ Benjamin Ltd (In liquidation), Re 90 WN (Pt 1) 107; [1969] 2 NSWR 374 (refd)
Bagshaw v Eastern Union Railway Co (1849) 7 Hare 114 (refd)
Barrell (Pauper) v Fordree [1932] AC 676 (refd)
Binney v Ince Hall Coal and Channel Co (1866) 35 LJ Ch 363 (refd)
Bond Media Ltd v John Fairfax Group Pty Ltd (1988) 14 ACLR 701, 7 ACLC 201 (refd)
Cape Breton Co v Fenn (1881) 17 Ch D 198 (refd)
Capita Financial Group Ltd v Rothwells Ltd (1989) 15 ACLR 348 (refd)
Capper & Anor v Baldwin [1965] 2 QB 53 (refd)
Cargo ex Argos (1873) LR 4 PC 134 (refd)
Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204 (refd)
Coastal Constructions Pty Ltd (In liquidation), Re (1994) 13 ACSR 329 (refd)
Cook v GS Deeks & Ors [1916] 1 AC 554 (refd)
Croxford v Universal Insurance Co Ltd [1936] 2 KB 253 (refd)
Destination Marine Services Sdn Bhd v ABS Pacific & Anor [1998] 3 CLJ Supp 355 (refd)
Eyston v Studd (1574) 2 Plowd 459 (refd)
Fargro Ltd v Godfroy & Ors [1986] 3 All ER 279 (refd)
Glass v Tarea Management (North Shore) Pty Ltd (In liquidation) (1990) 25 FCR 242, 95 ALR 752 (refd)
Gordon Grant & Grant Pty Ltd, Re [1983] 2 Qd R 314 (refd)
Haviland v Joslow (No 4) [1979] 2 NSWLR 318, [1979] ACLC 32 (refd)
Howe v RM MacDougall Pty Ltd (In liquidation) [1939] WCR 180 (refd)
IRC v Hinchy [1960] AC 748 (refd)
Maryon-Wilson's Will Trust, Re; Blofield v St Hill [1968] Ch 268 (refd)
McLennan Holdings Pty Ltd, Re [1983] 7 ACLR 732, 1 ACLC 786 (refd)
Mills v Northern Railway of Buenos Ayres Co (1870) 5 LR Ch App 621 (refd)
Mosbert Bhd (In liquidation) v Stella D'Cruz [1985] 2 MLJ 446 (refd)
R v Williams (1757) 1 WmB1 93 (refd)
Seymour v Southern Districts Video Pty Ltd (In liquidation) [1985] 4 FCR 596, 59 ALR 154 (refd)

Shuttleworth v Le Fleming (1865) 19 CB (NS) 687 (refd)
Speiser v Locums Financila Management Pty Ltd (1996) 22 ACSR 478; 15 ACLC 278 (refd)
Spokes v The Grosvenor and West End Railway Terminus Hotel Co Ltd & Ors [1897] 2 QB 124 (refd)
Stuart Bros Pty Ltd, Re (1995) 16 ACSR 451 (refd)
Sussex Peerage Case (1844) 11 Cl & Fin 85 (refd)
Sydney Formworks Pty Ltd, Re [1965] NSWR 646 (refd)
Testro Bros Consolidated Ltd [1965] VR 18 (refd)
Trade Practices Commission v Manfal Pty Ltd (No 2) (1990) 27 FCR 22; 97 ALR 231 (refd)
Vagrand Pty Ltd (In liquidation) v Fielding (1993) 41 FCR 550, 113 ALR 128 (refd)
Video Format Reproductions Pty Ltd, Re [1988] 2 Qd R 342, 92 FLR 370 (refd)
Wallersteiner v Moir; Moir v Wallersteiner & Ors [1974] 3 All ER 217, [1974] 1 WLR 991 (refd)
Wallersteiner v Moir (No 2); Moir v Wallersteiner & Ors (No 2) [1975] QB 373, [1975] 1 All ER 845 (refd)
Western & Brazilian Telegraph Co v Bibby (1880) 42 LT 821 (refd)
Wlaker, Ex parte (1982) 6 ACLR 423 (refd)
Zempilas v JN Taylor Holdings Ltd (In provisional liquidation) (No 3) (1991) 3 ASCR 755 (refd)

Legislation referred to

Companies Act 1965 s 226(3)
Companies Act 1981 s 371(2) [Aust]
Companies Act 1989 s 471B [Aust]

Gan Techiong (*Gan & Lim*) for the applicant.
Ishak Bakri (Federal Counsel cum Official Receiver Malaysia) for the respondent.

Abdul Malik Ishak J: This is an interesting case as it involves the interpretation of s 226(3) of the Companies Act 1965. The applicant, Bruno Phillipe Fehrenbach — a Frenchman, is a minority shareholder in a company known as Han Pacific Sdn Bhd. On 15 July 1998, the applicant filed a writ of summons in the form of a derivative action suing as a minority shareholder of Han Pacific Sdn Bhd. That writ of summons bears the Civil Suit No 22–388–1998 and the parties thereto were as follows:

BETWEEN

Bruno Phillipe Fehrenbach (seorang pemegang saham minoriti bagi pihak Han Pacific Sdn Bhd No Syarikat 362403-K) Plaintiff

AND

(1) James Hamilton McPhail
(2) Viva Capital Sdn Bhd (No Syarikat 419885-M)
(3) Ang Swee Hau @ Jeffrey Ang

(4) Complete Command Sdn Bhd (No Syarikat 447504-D) A

(5) Han Pacific Sdn Bhd (No Syarikat 362403-K) Defendants

In a derivative action, the name of the company itself must be named as a defendant so that the order of the court will bind the company. Thus, Han Pacific Sdn Bhd was named as one of the defendants in Civil Suit No 22 388-1998. In a derivative action, the plaintiff usually seeks to enforce a B cause of action which belongs to the company and not to him personally and the court can, in its discretion, at any time after the commencement of the action order the company to indemnify him for his costs on a common fund basis (in addition to the party and party costs recoverable by the plaintiff from the defendants), and such discretion is exercisable in the C plaintiff's favour whether the derivative action is eventually successful or not (*Wallersteiner v Moir (No 2); Moir v Wallersteiner & Ors (No 2)* [1975] QB 373; [1975] 1 All ER 845). Derivative actions have been entertained in many kindred situations. A person who is entitled to shares or an interest but is not registered as the holder of them in the company's register of members is entitled to institute a derivative action (*Bagshaw v Eastern Union* D *Railway Co* (1849) 7 Hare 114; *Binney v Ince Hall Coal and Channel Co* (1866) 35 LJ Ch 363; and *Mills v Northern Railway of Buenos Ayres Co* (1870) 5 LR Ch App 621). The court will definitely allow a derivative action to proceed if it is brought for the benefit of the company and this seems to be the sole purpose of the present applicant — a point advanced with enthusiasm by Mr Gan Techiong, of counsel for the applicant. E Derivative actions too have been allowed against directors who were in control of the company by misappropriating the company's assets (*Spokes v The Grosvenor and West End Railway Terminus Hotel Co Ltd & Ors* [1897] 2 QB 124), or against the directors who have misapplied the company's assets in breach of the Companies Act (*Wallersteiner v Moir; Moir v Wallers* [1974] 3 All ER 217; [1974] 1 WLR 991), or to compel the directors to F account to the company for profits made by them and depriving the company of those profits (*Cook GS v Deeks & Ors* [1916] 1 AC 554). In short, derivative actions remain a force to reckon with as it opens the door for the minority shareholders to advance their cause for the company.

But the derivative action of the applicant here moves into unchartered G water. On 16 July 1998, a day after the applicant filed his writ of summons, a winding-up order was made against Han Pacific Sdn Bhd by this court as a winding-up court. The applicant is in a dilemma as he is confronted by s 226(3) of the Companies Act 1965 which reads as follows:

> When a winding up order has been made or a provisional liquidator has been H appointed no action or proceeding shall be proceeded with or commenced against the company except —
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> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

and in that state of bewilderment, his solicitors, Messrs Gan & Lim, rightly I advised him to file an originating summons seeking a declaration in regard to the correct interpretation of that section. It is for this reason that the

A applicant files an originating summons in encl 4 which is supported by an affidavit in support of the applicant himself as seen in encl 3. Enclosure 4 seeks for the following prayers:

> (1) Perisytiharan bahawa atas tafsiran sebenar s 226(3) Akta Syarikat 1965, kebenaran Mahkamah tidak diperlukan oleh pemohon, yang merupakan
B plaintif dalam Guaman Sivil No 22-338 tahun 1998 yang telah memulakan tindakan tersebut sebagai pemegang saham minoriti syarikat Han Pacific Sdn Bhd (No Syarikat 362403-K), untuk meneruskan tindakan tersebut, walaupun syarikat tersebut telah digulungkan menurut perintah mahkamah yang mulia ini pada 16 Julai 1998; atau
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> (2) Jikalau mahkamah yang mulia ini memutuskan bahawa kebenaran
C mahkamah diperlukan, maka agar pemohon di berikan kebenaran untuk meneruskan sebagai plaintif dalam Guaman Sivil No 22-388 tahun 1998 tersebut;
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> (3) Lain-lain relif yang difikirkan wajar dan sesuai oleh mahkamah yang mulia ini.

D and it cites the Official Receiver as a party, a wise move. In the words of Seah SCJ in *Mosbert Bhd (In liquidation) v Stella D'Cruz* [1985] 2 MLJ 446, 447:

> ... It is for this reason that application under s 226(3) of the Companies Act 1965 should be made inter partes so that the summons could be served on the Official Receiver who should be heard before the discretion of the court is
E exercised. Without hearing the Official Receiver the court cannot be said to have exercised the discretion judicially.

The issue that confronted the Supreme Court in *Mosbert Bhd (In liquidation) v Stella D'Cruz*, inter alia, was whether 'leave of the court' should be obtained by way of: (a) an ex parte summons in chambers; or
F (b) inter partes summons, and the Supreme Court preferred that it be done inter partes. Procedurally, the applicant adopted the correct procedure in filing encl 4 by way of an originating summons (*Destination Marine Services Sdn Bhd v ABS Pacific & Anor* [1998] 3 CLJ Supp 355). Put in another way, an application for leave to proceed is usually made by way of an originating summons and service must be made on the liquidator (*Western & Brazilian*
G *Telegraph Co v Bibby* (1880) 42 LT 821 (Ch); and *Glass v Tarea Management (North Shore) Pty Ltd (In liquidation)* (1990) 25 FCR 242 (95 ALR 752). But for the present exercise, the service of encl 4 to the Official Receiver would be sufficient to move the court into action (*Mosbert Berhad (In liquidation) v Stella D'Cruz*).

H Now, the issue of the day that this court has to resolve is this:

> Whether on the true and correct interpretation of s 226(3) of the Companies Act 1965 leave of the court is required by the applicant to proceed with the Civil Suit No 22-388-1998?

The key words in s 226(3) of the Companies Act 1965 would be 'against
I the company', and once a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced except by leave of the court. That action or proceeding

must be 'against the company.' The High Court judge in *Mosbert Bhd (In liquidation) v Stella D'Cruz* who heard the case at the first instance before the matter went up to the Supreme Court, granted leave to Stella D'Cruz to prosecute her claim against the appellant company on an ex parte application pursuant to s 226(3) of the Companies Act 1965 and, on appeal to the Supreme Court, Seah SCJ remarked that although leave was given on an ex parte application, the Official Receiver was represented and heard the application to set aside the order and, consequently, no substantial injustice had been caused to the appellant company. Factually, the present case stands on a different footing. The applicant is not proceeding or commencing an action against the company — Han Pacific Sdn Bhd, but rather he is commencing a derivative action as a minority shareholder for the benefit of that company, and not against that company. In a steady flow of submission Mr Gan Techiong, learned counsel for the applicant, holds steadfast to the argument that no leave is required as the applicant's Civil Suit No 22–388–1998 is for the benefit of the company — meaning no doubt Han Pacific Sdn Bhd. Mr Ishak Bakri, learned federal counsel for the respondent, initially holds the view that leave is necessary but later he changes his mind and goes along with what Mr Gan Techiong says. My view is simply this. Since a derivative action is for the benefit of the company and not against the company, then s 226(3) of the Companies Act 1965 has no application at all. That section categorically uses the words 'against the company' and since the derivative action undertaken by the applicant is for the benefit of the company, no leave of the court is required. This becomes apparent if one bears in mind that the Civil Suit No 22–388–1998 was filed one day before the winding up order was made against Han Pacific Sdn Bhd by this court.

Judges before me have resorted to 'equitable construction' in order to ascertain the intention of the legislature (*R v Williams* (1757) 1 WmB1 93). According to Byles J in *Shuttleworth v Le Fleming* (1865) 19 CB (NS) 687, 703 that the phrase 'within the equity' means the same as 'within the mischief' of a statute. Thus, it is not surprising that an equitable construction is unobjectionable and is still common practice. In applying the mischief rule, one must be 'beneficial' and adopt a fairly liberal approach to problems of interpretation so as to prevent evasion of its terms. Experience has shown, and it has greatly enriched us, that no lawmakers can foresee all things which may happen in the future. Therefore it is only fitting that if there be any defect in the law, it should be reformed by equity (*Eyston v Studd* (1574) 2 Plowd 459). Applying the equitable construction, leave is only required in s 226(3) of the Companies Act 1965 when an action or proceeding is commenced against the company. In a derivative action which is for the benefit of the company, no such leave is required. It would be absurd to construe otherwise. As Ungoed-Thomas J said in *Re Maryon-Wilson's Will Trust, Blofield v St Hill* [1968] Ch 268 at p 282:

> ... If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice.

The sage words of Lord Reid in *IRC v Hinchy* [1960] AC 748 at p 767 should be reproduced. There his Lordship said:

> ... we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.

I only need to apply the words in s 226(3) of the Companies Act 1965 as they stand and give an interpretation that accords with common sense and justice. I am doing just that. Incidentally, Scott LJ in *Croxford v Universal Insurance Co Ltd and another appeal* [1936] 2 KB 253 at p 280 once said:

> ... Where the words of an Act of Parliament are clear, there is no room for applying any of those principles of interpretation, which are merely presumptions in cases of ambiguity [in the statute].

Lord Warrington of Clyffe in *Barrell (Pauper) v Fordree* [1932] AC 676 at p 682 succinctly said:

> ... the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases.

Lord Parker CJ in *Capper & Anor v Baldwin* [1965] 2 QB 53, 61 aptly said that the function of the court is to interpret an Act 'according to the intent of them that made it' and the intention must certainly be deduced from the language used. To me if the words of the statute are themselves precise and unambiguous, then the only duty would be to expound those words in their ordinary and natural sense. Sometimes, the words by themselves alone best declare the intention of the lawgivers (*Sussex Peerage Case* (1844) 11 Cl & Fin 85 at p 143; and *Cargo ex Argos* (1873) LR 4 PC 134, 513). Now applying all these authorities, the words 'against the company' are precise, clear and unambiguous and it must be the intention of the legislature to employ such words and exclude the leave requirement in a case where the action is for the benefit of the company, just like the present case, and I so hold accordingly. The duty of the court is simple. It is to give effect to the will of Parliament.

In the majority of cases where s 226(3) of the Companies Act 1965 apply, the reliefs sought were against the companies. *Mosbert Bhd (In liquidation) v Stella D'Cruz* is a striking example where the relief sought was against the company and it was correctly decided that s 226(3) of the Companies Act 1965 applied. There is a short passage from Abu Mansor JCA in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 that merits reproduction (at p 210):

> We respectfully agree with the learned judge below that the applicant's application should be so dismissed but for a different reason than that given by the learned judge. We think that s 266(3) of the Act only applies where the action is against the company but, as submitted by counsel for the applicant, in this case the action was against the liquidator we have held, that s 305 of the Act applies.

Obviously in a clear cut case where the company has been ordered to wind up or a provisional liquidator has been appointed, an action or proceeding against that company can only be proceeded with or commenced with the leave of the court. It is said that when a company is in liquidation, a minority shareholder's action will not lie. The appropriate procedure, it seems, would be for the liquidator to bring the action on behalf of the company or, if the liquidator refuses to do so, a contributory may apply to the court for an order authorising him to bring the action in the company's name or compelling the liquidator to do so on such terms as to indemnity as the court considers appropriate. This seems to be the learned views of Walton J as expressed in *Fargro Ltd v Godfroy & Ors* [1986] 3 All ER 279, and at p 281 his Lordship observed:

> ... But once the company goes into liquidation the situation is completely changed, because one no longer has a board, or indeed a shareholders' meeting, which is in any sense in control of the activities of the company of any description, let alone its litigation. Here, what has happened is that the liquidator is now the person in whom that right is vested.
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> Now, that being the case, the plaintiff can take a variety of courses. The plaintiff can ask the liquidator to bring the action in the name of the company. Doubtless, as in virtually all cases, the liquidator will require an indemnity from the persons who wish to set the company in motion against all the costs, including, of course, the costs of the defendants, which he may have to incur in bringing that action. The liquidator may ask for unreasonable terms or, on the other hand, the liquidator may be unwilling to bring the action, and, under those circumstances, it is always possible for the shareholders who wish the action to be brought to go to the court asking for an order, either that the liquidator bring the action in the name of the company or, more usually, that they are given the right to bring the action in the name of the company, of course, against the usual type of indemnity which will, if there is any difficulty about the matter, be settled by the court. And I think that this has been the practice and procedure for a very long time indeed. It is certainly referred to by Cotton LJ in *Cape Breton Co v Fenn* (1881) 17 Ch D 198 at p 208 where he says:
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> > 'There is nothing in the Act of Parliament which gives the court such power [that is, power to authorize somebody other than a shareholder or creditor of the company, to bring proceedings in the name of a company], and prima facie proceedings in the name of the company ought to be conducted by the liquidator [in this case, of course, it was a compulsory liquidation] — an officer appointed by the court and subject to the supervision of the court. There may be, no doubt, special cases where, although the court does not think fit to remove the liquidator on the ground that his conduct in not bringing an action is improper, it may give power to other persons to conduct the litigation upon their giving proper indemnity against any consequences of that litigation. But who are the persons who can be authorized to take these steps? In my opinion the creditors and the contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the liquidator does not properly do his duty. They have a right in special cases to ask the court for leave to do that which the liquidator is advised not to do, or which, [and in practical terms this is

> usually the reason] because he has no funds, he does not do, viz, take proceedings in the name of the company, but in my opinion the power of the court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation.'
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> So that is a course which it has always been open for the plaintiff in the present case to take, and we know, from the correspondence that they have been having with the liquidator, that the liquidator, subject of course to proper indemnities, has no objection whatsoever to the action being brought by himself in the name of the company.

In *Cape Breton Company v Fenn* (1881) 17 Ch D 198 (CA), the court refused to give leave to sue in the name of the company to strangers who were neither creditors nor contributories and who have no charge on the assets of the company. The applicant here is certainly not a stranger. He is a minority shareholder of Han Pacific Sdn Bhd and certainly has locus standi to sue for the benefit of the company by way of a derivative action, and as I said, without the need to obtain leave of the court.

In Australia, the scenario is different. Section 371(2) of the Australian Companies Act 1981 is a verbatim reproduction with our s 226(3) of the Companies Act 1965. In 1989, the Australian Companies Act 1981 was amended and replaced by the Australian Companies Act 1989 and s 471B thereof relates to stay of proceedings and suspension of enforcement process and it is worded as follows:

> 471B While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:
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> (a) a proceeding in a court against the company or in relation to property of the company; or
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> (b) enforcement process in relation to such property;
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> except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

and the words 'in relation to property of the company' would amply cover derivative actions. There is an authority emanating from Australia to the effect that in a compulsory winding up a person cannot, without the leave of the court, begin or proceed with a court proceeding against the company or in relation to its property or any enforcement process in relation to such property. On this very point there are several known authorities and there is even s 358 of the Australian Companies Act 1981 direct on the point. Cases like *Trade Practices Commission v Manfal Pty Ltd (No 2)* (1990) 27 FCR 22; 97 ALR 231; *Seymour v Southern Districts Video Pty Ltd (In liquidation)* [1985] 4 FCR 596; 59 ALR 154; *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732; 1 ACLC 786; *Re Video Format Reproductions Pty Ltd* (1988) 2 Qd R 342; 92 FLR 370; and *Bond Media Ltd v John Fairfax Group Pty Ltd* [1988] 14 ACLR 701; 7 ACLC 201 are germane examples where the prohibitions were discussed at great length. It would be interesting to note that the court in *Trade Practices Commission v Manfal Pty Ltd* held that such a prohibition did not apply to proceedings by the crown. Why, may one ask is the object of these restrictions? Can't an individual advance his legitimate

right in a court of law? These restrictions or prohibitions, whatever label you call them, are simply there to prevent the assets of an insolvent company from being wasted and dissipated in wasteful litigation. Creditors are therefore obliged to prove their claims in winding-up proceedings (*Haviland v Joslow (No 4)* [1979] 2 NSWLR 318, [1979] ACLC 32, 557; *Capita Financial Group Ltd v Rothwells Ltd* (1989) 15 ACLR 348; and *Re Gordon Grant & Grant Pty Ltd* [1983] 2 Qd R 314). McLelland CJ in *Re Sydney Formworks Pty Ltd* [1965] NSWR 646 spoke favourably of these restrictions or prohibitions. His Lordship was of the view, rightly so, that it prevents a particular creditor from gaining an advantage over the general body of creditors by proceeding to judgment and execution against the property of an insolvent company.

In the context of our s 226(3) of the Companies Act 1965, leave would readily be given by the court if all the requirements are fulfilled. It is a correct statement of the law to say and I so say that the court considers whether leave to proceed should be granted by looking at the nature of the plaintiff's claim, the balance of convenience and the justice of the case (*Re Gordon Grant & Grant Pty Ltd*; *Re Stuart Bros Pty Ltd* (1995) 16 ACSR 451; and *Speiser v Locums Financial Management Pty Ltd* (1996) 22 ACSR 478; 15 ACLC 278 (SC (NSW)). Thus, in a situation where it is unlikely that the plaintiff will obtain any advantage over the creditors and that no prejudice will be caused either to the creditors or to the orderly winding up of the company, leave will be granted as a matter of course (*Re Gordon Grant & Grant Pty Ltd*; and *Ex p Walker* (1982) 6 ACLR 423). The court in *Re Coastal Constructions Pty Ltd (In liquidation)* (1994) 13 ACSR 329 in determining whether leave to proceed should be granted was of the view that there was a necessity to examine the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved and, lastly, the stage which the proceedings have reached. It must not be forgotten that the applicant too must establish that he or she has a prima facie case meaning that the applicant must show that there is a real dispute between the parties (*Zempilas v JN Taylor Holdings Ltd (In Prov Liq) (No 3)* [1991] 3 ACSR 755 (SC (SA)); and *Vagrand Pty Ltd (In liquidation) v Fielding* (1993) 41 FCR 550; 113 ALR 128). All these are factual situations where the courts are willing to grant leave to the applicants. But the applicant here need not obtain leave as he is not proceeding against the company but rather, as I said, for the company. In my judgment, s 226(3) of the Companies Act 1965 is irrelevant and the applicant is entitled to proceed in his derivative action in Civil Suit No 22–388–1998 forthwith.

There is one other interesting point that needs to be highlighted. It is this. Since the applicant had filed the Civil Suit No 22–388–1998 one day earlier before the company was ordered to be wound up, can the applicant be given leave nunc pro tunc? *Osborn's Concise Dictionary* (7th Ed) by Roger Bird at p 238 defines the term nunc pro tunc as 'now for then' and 'As when the court directs a proceeding to be dated as of an earlier date than that on which it was actually taken.' McLelland CJ in *Re Sydney Formworks Pty Ltd (In liquidation)* had to consider whether to grant leave nunc pro tunc to commence the action. The headnotes read as follows:

A In January 1961 G was injured in the course of his employment with SF Pty Ltd. In February 1962 a winding up order was made against SF Pty Ltd. In July 1963 G sued SF Pty Ltd claiming damages for negligence, but inadvertently omitted to obtain the leave of the Equity Court before so doing. By an amended plea SF Pty Ltd pleaded the failure to obtain that leave as a bar to the action. Thereupon G made application for an order that he be at B liberty nunc pro tunc to commence the action for damages.

Held: (1) That the Equity Court had jurisdiction to make an order giving leave to continue the action or giving leave nunc pro tunc to commence the action.

In the body of the judgment, his Lordship said at p 560:

C Section 218 of the Companies Act 1936–1960, is in the following terms: 'When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the Court imposes.' This section is substantially identical with s 140 of the Companies Act 1874, and s 94 of the Companies Act 1899, and these sections D were substantially identical with s 87 of the Companies Act 1862 (UK), now represented by s 231 of the Companies Act 1948 (UK).

The first question for consideration is what effect have the provisions of s 218 upon an action which has been commenced without the leave of this court first having been obtained. Can the section be pleaded in bar to the action or is the appropriate course to make an application to the court in which E the winding-up is proceeding to restrain its continuance without the leave of that court?

And later after considering a few authorities, his Lordship continued at p 562:

The result of the cases on the Companies Acts which I have mentioned is that F the section cannot be pleaded in bar to the action and that the court administering the liquidation may give leave, if it thinks proper to do so, to continue an action which has been commenced without leave. This view is in keeping with what I consider to be the obvious intention of the section, namely, to ensure that the assets of the company in liquidation will be administered in accordance with the provisions of the Companies Act and that G no person will get an advantage to which, under those provisions, he is not properly entitled, and to enable the court effectively to supervise all claims brought against the company which is being wound up.

Finally, at p 564 his Lordship tersely said:

I am clearly of opinion that this court in the present case has jurisdiction now H to make an order that will enable the action for damages against the company to continue, whether the order be couched in terms simply giving leave to continue with the action or in terms that the applicant may be at liberty nunc pro tunc to commence the action No 5812 of 1963.

Then there is the case of *Howe v RM MacDougall Pty Ltd (In liquidation)* (1939) 13 WCR 180 (NSW), where Long Innes J had to consider whether I leave nunc pro tun should be given to institute proceedings to validate an award made by the Workers' Compensation Commission in a case where the award had been made by default against a company in compulsory

liquidation in proceedings which had been commenced without the leave of the Court of Equity. His Lordship took into account the fact that the award was made by default and he too considered that the company should be given the opportunity of having the matter considered on its merits and for these reasons his Lordship was prepared to grant an order granting leave nunc pro tunc as soon as the necessary steps were taken to set aside the award.

Sholl J in *Re Testro Bros Consolidated Ltd* [1965] VR 18 said at p 35 of the report:

> In the result, therefore, I have come to the conclusion, with all deference to the contrary view of my brother Gillard, that I ought to apply to the interpretation of s 199 the view which the courts in Australia have taken hitherto of similar provisions, in relation to winding up, and hold that the present petition can be validated, independently of s 366, by treating the proceedings as if leave had been duly obtained. Such legislation is aimed at preserving the control of the Supreme Court over the administration of a company's affairs, a purpose which is sufficiently achieved by interpreting sections like s 199 rather as conferring a control of a directory character on the court, than as setting up an absolute bar like a statute of limitations.

Indeed if I am amenable to grant leave nunc pro tunc it would squarely come under prayer 3 of encl 4. In my judgment, there is no necessity to grant leave nunc pro tunc as the applicant had filed his Civil Suit No 22-388-1998 one day earlier before the company was wound up. There is no urgency to back date the leave since the proceedings had commenced. In *Re AJ Benjamin Ltd (In liquidation)* 90 WN (Pt 1) (NSW) 107; [1969] 2 NSWR 374, the writ was issued after the commencement of winding-up and Street J granted leave to proceed nunc pro tunc, which I may add was an appropriate step to take. This was what Street J said in that case:

> The matter for decision on the present application is whether the statutory fetter imposed by s 230 should be released so far as the applicant is concerned. That fetter is imposed by the Act in the Part which deals with the winding up of companies. Where a company is being wound up as an insolvent company it is recognized that the legislative policy contemplates the assets of the company being taken under the control of a liquidator and administered with due regard to the rights inter se of the creditors of the company. Independent actions by creditors are not encouraged in a winding up. Responsibility for satisfying the rights of creditors is placed upon the liquidator. If the grant of this leave could be seen to be likely to lead to attempts on the part of the applicant to reopen anything already done in the winding up, then it is probable that if leave were to be granted it would be hedged about with conditions. Leave is not to be withheld simply and solely as a punishment: the primary consideration is the enabling of an orderly winding up. If no prejudice, procedural or substantive, will flow to those having interests in the winding up, an applicant has a strong case for gaining the leave he seeks. The wide power of the court to impose conditions will ordinarily be exercised to prevent the risk of prejudice.
>
> In the present case the respondent is insured against the liability that the applicant seeks to propound. I see no difficulty in imposing upon the applicant the ordinary term shutting him out from proving in competition with the other

creditors of the company. Indeed, his claim is not such as to be admissible to receive dividends in the winding up until all creditors have been paid in full (*Page v Commonwealth Life Assurance Society Ltd* (1935) 36 SR (NSW) 85; WN 21; this is of itself an element favouring the grant of leave. It is also relevant and admissible to recognize that the respondent is insured, because it is the hope of recovering under the insurance policy that presents the prospect of the applicant's claim being fruitful. If there were no prospect of surplus assets in the company, and no question of insurance, then that alone might well provide a reason for refusing leave to proceed with what would ex hypothesi be merely an empty action.

I have carefully considered, in the interests of a regular and orderly winding up, and in the interests of the creditors as a general body, the administrative concomitants of the grant of leave to the present applicant. Notwithstanding the grossness of the delay in the present case, I am of the view that the scope of the discretion is not such as to require my rejecting the application for leave to proceed. There is already authority in this court justifying the grant of leave to proceed nunc pro tunc (*Re Sydney Formworks Pty Ltd (In liquidation)* [1965], 82 WN (Pt 1) (NSW) 558). In the present case I consider that a grant of leave nunc pro tunc should be made as it was in that case.

Street J was quite magnanimous in granting leave nunc pro tunc even though there was gross delay in filing the writ in that case. Here, the facts are entirely different and in sharp contrast: the writ was filed before the company was wound up and the applicant proceeded in a derivative action for the benefit of the company.

For these varied reasons, I granted prayer (1) of encl 4 forthwith with no order as to costs.

Declaration granted.

Reported by Zahid Taib